



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-23-00059-CV

CYNTHIA WILSON, APPELLANT

V.

JOSHUA GRAHAM AND JOSHUA GRAHAM & ASSOCIATES, PLLC, APPELLEES

On Appeal from the 342nd District Court
Tarrant County, Texas¹
Trial Court No. 342-320981-20, Honorable Kimberly Fitzpatrick, Presiding

August 7, 2023

MEMORANDUM OPINION

Before PARKER and DOSS and YARBROUGH, JJ.

In this legal malpractice case, Appellant, Cynthia Wilson, appeals from an order granting summary judgment in favor of Appellees, Joshua Graham and Joshua Graham & Associates, PLLC (collectively “Graham”). We affirm.

¹ This appeal was transferred to this Court from the Second Court of Appeals by docket equalization order of the Supreme Court of Texas. See TEX. GOV'T CODE ANN. § 73.001.

BACKGROUND

Wilson was employed by McDonald Transit Associates from 1993 until 2019. On January 4, 2019, Wilson and McDonald signed a settlement and severance agreement and release reflecting the termination of Wilson's employment. The agreement provided, among other things, that McDonald would pay Wilson a severance payment and Wilson would release McDonald from any and all claims she had against it related to her employment.

On January 15, Wilson met with Graham regarding the possibility of asserting claims for "unfair treatment and practices in the workplace [and] harassment and bullying" against McDonald. Wilson executed a legal services agreement two days later and tendered a \$1,500 retainer fee. The legal services agreement stated that the purpose and scope of representation was limited to three services: (1) drafting and sending a demand letter to one opposing party, (2) drafting and sending an anti-spoliation letter to one opposing party, and (3) representing Wilson in negotiating settlement terms.

On May 10, 2019, an attorney employed by Graham sent a demand letter and anti-spoliation letter to McDonald, alleging that the company had wrongfully terminated Wilson. Counsel for McDonald responded, denying the allegations of wrongdoing, rejecting Wilson's demands, and citing the releases contained in the settlement and severance agreement. It appears that there was little, if any, further activity by Graham on the matter, although Wilson made "repeated attempts and inquiries to Graham regarding the status" of her case. In November of 2019, Wilson and Graham parted ways.

Wilson retained her current counsel and brought suit against McDonald in January of 2020.² She then filed the instant lawsuit against Graham in October of 2020, alleging legal malpractice and breach of fiduciary duty. In October of 2022, Graham filed its no-evidence and traditional motions for summary judgment. The trial court granted summary judgment on December 2, 2022, and Wilson timely filed this appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

We review grants of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). In our review, we take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve any doubts in the non-movant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When, as here, a party moves for both traditional and no-evidence summary judgments, we first consider the no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the non-movant fails to meet its burden under the no-evidence standard, there is no need to consider the traditional motion. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

To defeat a no-evidence motion, the non-movant must produce evidence raising a genuine issue of material fact as to the challenged elements. See *Ridgway*, 135 S.W.3d at 600. A genuine issue of material facts exists if the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (quoting *Burroughs Wellcome*

² McDonald filed a plea to the jurisdiction on the grounds that Wilson failed to exhaust her administrative remedies. The trial court sustained the plea and dismissed the suit in June of 2021.

Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995)). Evidence does not create an issue of material fact if it is “so weak as to do no more than create a mere surmise or suspicion” as to the existence of the fact. *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014) (quoting *Ridgway*, 135 S.W.3d at 601). Under the traditional summary judgment standard, the movant meets its burden if it proves that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

To prevail on a legal malpractice claim, a plaintiff must establish that “the defendant owed the plaintiff a duty, the defendant breached that duty, the breach proximately caused the plaintiff’s injury, and the plaintiff suffered damages.” *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009). The failure to meet the proper standard of care may include an attorney’s failure to exercise ordinary care in preparing, managing, and presenting litigation. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119 (Tex. 2004). Expert testimony is required to show that tactical choices were unwise and the consequences of those choices. *Id.* at 119–20. “When a legal-malpractice case arises from prior litigation, the plaintiff must prove that the client would have obtained a more favorable result in the underlying litigation had the attorney conformed to the proper standard of care.” *Rogers v. Zanetti*, 518 S.W.3d 394, 401 (Tex. 2017).

ANALYSIS

Legal Malpractice Claim

In its no-evidence motion on Wilson’s legal malpractice claim, Graham asserted that Wilson had no evidence that Graham breached a duty of care and that the alleged

breach proximately caused Wilson damage. It is undisputed that Wilson did not provide any expert testimony in support of her claims, and the crux of the parties' arguments on appeal is whether Wilson can maintain her legal malpractice suit against Graham in the absence of such evidence.

Wilson contends that she is not required to provide expert testimony to meet the essential elements of her case because Graham's negligence is "clear and obvious" since Graham missed the statute of limitations on filing Wilson's claims for relief with the Texas Workforce Commission and Equal Employment Opportunity Commission.³ Wilson relies on *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied) (op. on en banc reh'g) in support of her claim that no expert testimony is necessary. But the *Mazuca* case is not on point. In *Mazuca*, the court addressed the need for expert testimony to establish the standard of care, holding that expert testimony was not needed to establish that an attorney breached the standard of care by failing to file a case before the statute of limitations expired. See *id.* But this does not speak to proximate cause.

As the Supreme Court of Texas has explained, "Breach of the standard of care and causation are separate inquiries, . . . and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. Thus, even when negligence is admitted, causation is not presumed." *Alexander*, 146 S.W.3d at 119–20. "A lawyer can

³ This argument presupposes that pursuing such claims was within the scope of Graham's representation, which Graham does not concede.

be negligent and yet cause no harm.” *Rogers*, 518 S.W.3d at 400. “And, if the breach of duty of care does not cause harm, no valid claim for legal-malpractice exists.” *Id.*

To satisfy the causation element of a legal malpractice claim when the plaintiff alleges that some failure on the attorney’s part caused an adverse result in prior litigation, a plaintiff must establish that she would have prevailed in the underlying case “but for” the attorney’s negligence. *Alexander*, 146 S.W.3d at 117. This burden is often referred to as the “suit within a suit” requirement. See *Greathouse v. McConnell*, 982 S.W.2d 165, 173 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). “Generally, in a legal malpractice case, expert witness testimony is required to rebut a defendant’s motion for summary judgment challenging the causation element.” *Starwood Mgmt., LLC by and through Gonzalez v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam).

In *Rogers*, the Supreme Court of Texas explained that malpractice claims may “involve imprudent attorney actions that materially and unfavorably affect the value of the client’s underlying claim or defense” and, therefore, “do not always depend on ultimate victories.” *Rogers*, 518 S.W.3d at 404. Thus, Wilson relies on *Rogers* in an attempt to skirt the “suit within a suit” analysis, arguing that “a lay person can understand that blowing a statute of limitations deadline leaves a client in a much less favorable position than if the attorney had properly discharged their [sic] duty and advised a client accordingly.”

We disagree with Wilson’s reasoning. “As in other negligence cases, a legal-malpractice plaintiff must prove that his or her lawyer’s negligence was the proximate cause of cognizable damage.” *Id.* at 402. Wilson failed to bring forth evidence to show

that, but for Graham's alleged mishandling of the case, the outcome of her underlying employment discrimination suit would have been more favorable. "Expert testimony is required when an issue involves matters beyond jurors' common understanding." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006). This case hinges on whether Wilson had viable claims against McDonald and would have obtained a favorable outcome in a lawsuit against McDonald. These determinations are outside the scope of a layperson's common knowledge or experience. Thus, expert testimony was necessary. See, e.g., *Rogers*, 518 S.W.3d at 404–10 (summary judgment proper because no competent expert stated jury would have returned different verdict if trial counsel had employed different strategy); *Saldana-Fountain v. Chavez Law Firm*, 450 S.W.3d 913, 918 (Tex. App.—El Paso 2014, no pet.) (no-evidence summary judgment proper where plaintiff failed to offer expert testimony on causation); *Lopez v. Yates*, No. 14-01-00649-CV, 2002 Tex. App. LEXIS 8229, at *9 n.5 (Tex. App.—Houston [14th Dist.] Nov. 21, 2002, no pet.) (affirming summary judgment where plaintiff failed to present evidence demonstrating he had "case within a case" that would entitle him to damages).

Because Wilson's legal malpractice claim required expert testimony regarding causation, and Wilson failed to come forward with such evidence, summary judgment in favor of Graham was appropriate on the legal malpractice claim.

Breach of Fiduciary Duty Claim

Graham's summary judgment motion asserted that Wilson's breach of fiduciary duty claim fails as a matter of law because Texas courts do not recognize efforts to fracture negligence-based claims into breach of fiduciary duty claims. We agree.

Under Texas law, a plaintiff is not permitted to divide or “fracture” a legal malpractice claim into additional claims that do not sound in negligence. *Perkins v. Walker*, No. 14-17-00579-CV, 2018 Tex. App. LEXIS 5589, at *4–5 (Tex. App.—Houston [14th Dist.] July 24, 2018, no pet.) (mem. op.). Other claims may coexist alongside legal malpractice claims, but a plaintiff cannot merely reassert a legal malpractice claim under an alternative label. *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Whether allegations labeled as breach of fiduciary duty, fraud, or some other cause of action are actually claims for professional negligence is a question of law. *Id.* If the crux of the complaint is inadequate legal representation, it is a claim for legal malpractice. *Kimleco Petrol., Inc. v. Morrison*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied).

In her petition, Wilson asserted that Graham breached its fiduciary duty “by providing inaccurate legal advice” to her. Thus, the gist of Wilson’s complaint is that Graham did not provide adequate legal representation; consequently, her claim should be pursued only as a professional negligence claim. The prohibition on fracturing professional negligence claims bars Wilson’s breach of fiduciary duty claim. See *James v. Witherite*, No. 05-17-00799-CV, 2018 Tex. App. LEXIS 9214, at *23–24 (Tex. App.—Dallas Nov. 9, 2018, no pet.) (mem. op.). Therefore, summary judgment was warranted.

Because Wilson failed to meet her burden under the no-evidence standard, we need not consider Graham’s traditional motion. *Merriman*, 407 S.W.3d at 248.

CONCLUSION

Having concluded that Graham was entitled to summary judgment on both Wilson's legal malpractice claim and breach of fiduciary duty claim, we affirm the trial court's judgment.

Judy C. Parker
Justice